

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHI CHEN, et al.,

Case No. C16-1109RSM

Plaintiffs,

**ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT RE:
EXONERATORY CLAUSE**

U.S. BANK NATIONAL ASSOCIATION, et al.,

Defendants.

I. INTRODUCTION

This matter comes before the Court on Plaintiffs' Motion for Partial Summary Judgment re: Unenforceability of Exculpatory Clause. Dkt. #285. Plaintiffs move the Court to rule as a matter of law that a clause in the Master Escrow Agreement is unenforceable under two different legal theories; this clause limits U.S. Bank's liability to situations where its gross negligence is the primary cause of investor's loss. U.S. Bank opposes. Dkt. #305. There has been no request for oral argument. For the reasons stated below, the Court GRANTS IN PART this Motion.

II. BACKGROUND

The Court need not recite all the possible background facts to rule on this motion for partial summary judgment.

1 The Court has previously stated in this case:

2 Plaintiffs in this case are Chinese citizens who each invested
 3 \$500,000 in a mining venture run by Defendants Quartzburg Gold,
 4 LP (“Quartzburg”) and Idaho State Regional Center, LLC, in order
 5 to qualify for the United States’ EB-5 immigration investor
 6 program. Dkt. #3 at 2–3. At issue in this Motion is the Master
 7 Escrow Agreement used by Defendants to structure the receipt and
 8 distribution of investment funds. Dkt. #237-1 at 2. Although the
 9 original agreement was between Defendants, Plaintiff investors
 10 later executed Joinders making each of them an “Investor... to the
 11 same extent as if such Person had originally executed this Master
 12 Escrow Agreement.” *Id.*

13 Under the Agreement U.S. Bank was the “Escrow Agent.” Dkt.
 14 #237-1 at 2. The “Background” section states that the money was
 15 entering and exiting escrow to permit investors to qualify for EB-5
 16 visas “with the objective of attaining lawful permanent residence
 17 in the United States.” *Id.* A choice of law provision sets
 18 Washington State as the source of governing law. *Id.* at 12.

19 The parties agreed that U.S. Bank would disburse the investors’
 20 funds held in escrow “upon receipt of, and in accordance with a
 21 Written Direction.” *Id.* at 4. A Written Direction was to be
 22 “executed by the Issuer Representative” only. *Id.* “Issuer” refers
 23 to Quartzburg, and the Issuer Representative is listed as Debra
 24 Riddle, who worked for Quartzburg. *Id.* at 15. To put it another
 25 way, this agreement permitted the investor’s funds to be disbursed
 26 to Quartzburg upon the written request of Quartzburg without any
 27 further authorization from the investors.

28 An example of what was required in a Written Direction is found
 29 at Exhibit I to the Agreement. *See id.* at 17. According to this
 30 example, Ms. Riddle would send Written Directions to U.S. Bank
 31 listing specific Investors and the change to their immigration status
 32 that warranted distribution of funds. The form lists five possible
 33 reasons why the funds would be disbursed: a) Approval of
 34 Investor’s I-526 Petition with attached I-797 Notice of Action—
 35 funds to be wired to Quartzburg; b) approval of Investor’s I-526
 36 Petition with attached Immigrant Visa Application Processing Fee
 37 Bill Invoice—funds wired to Quartzburg; c) denial of Investor’s I-
 38 526 Petition with attached Form I-797 Notice of Action—funds
 39 wired back to Investor; d) passage of 18 months with no action or
 40 information from USCIS—funds wired back to Investor; e)
 41 Quartzburg’s approval of Investor’s request for return of escrow
 42 funds—funds wired back to Investor. *Id.* at 17–18.

Dkt. #249 at 2–3. Each Plaintiff filed his or her EB-5 forms, deposited \$500,000 in escrow with U.S. Bank, and agreed to be bound by the Master Escrow Agreement by signing a joinder. *See id.* at 3. USCIS issued receipts of the EB-5 petitions, however these did not reflect approval and stated at the top, “THIS NOTICE DOES NOT GRANT ANY IMMIGRATION STATUS OR BENEFIT.” *See id.* Quartzburg nevertheless submitted Written Directions instructing U.S. Bank to disburse to it the escrow funds from the investors, with attached copies of receipts with the above language from USCIS. *Id.* U.S. Bank erroneously relied on these Written Directions and released the funds. Plaintiffs’ EB-5 petitions were not approved and Plaintiffs have not received refunds from Quartzburg.

The instant suit was filed on December 3, 2015. Dkts. #1-2. Plaintiffs allege that U.S. Bank breached the escrow agreement, causing the loss of the \$500,000 investments.

U.S. Bank has focused on Section 8 of the Escrow Agreement as a basis for limiting liability. Section 8 states, in part:

Liability of Escrow Agent. The Escrow Agent undertakes to perform only such duties as are expressly set forth herein and no duties shall be implied. The Escrow Agent shall have no liability under and no duty to inquire as to the provisions of any agreement other than this Master Escrow Agreement. The Escrow Agent shall not be liable for any action taken or omitted by it in good faith except to the extent that a court of competent jurisdiction determines that the Escrow Agent’s gross negligence or willful misconduct was the primary cause of any loss to an Investor or Issuer.... Escrow Agent shall have no implied duties or obligations and shall not be charged with knowledge or notice of any fact or circumstance not specifically set forth herein. Escrow Agent may rely upon any notice, instruction, request or other instrument, not only as to its due execution, validity and effectiveness, but also as to the truth and accuracy of any information contained therein, which Escrow Agent shall believe to be genuine and to have been signed or presented by the person or parties purporting to sign the same. In no event shall Escrow Agent be liable for incidental, indirect, special, consequential or punitive damages....

1 Dkt. #237-1 at 7.

2 On March 3, 2020, the Court issued an Order on a summary judgment motion brought
 3 by a single Plaintiff, stating in part:

4 As one would expect, Defendant U.S. Bank relies heavily on
 5 Section 8, which purports to limit U.S. Bank's liability to
 6 situations of willful misconduct or gross negligence. U.S. Bank
 7 argues that under Washington law, “[w]illful” requires a showing
 8 of actual intent to harm” and that “acting volitionally upon a
 9 mistake does not show willfulness.” Dkt. #231 at 18 (citing
 10 *Zellmer v. Zellmer*, 164 Wn.2d 147, 155 n.2, 188 P.3d 497 (2008);
 11 *Riley v. Iron Gate Self Storage*, 198 Wn. App. 692, 706-07, 395
 12 P.3d 1059 (2017)). U.S. Bank is correct that Yu “has presented no
 13 evidence of willful misconduct whatsoever.” *See id.* U.S. Bank
 14 cites to *Harper v. Dep’t of Corr.*, 192 Wn.2d 328, 340-41, 429
 15 P.3d 1071 (2018) for the elements of gross negligence: “[g]ross
 16 negligence most obviously differs from simple negligence in that it
 17 requires a greater breach; to prove gross negligence, [the plaintiff]
 18 must show that [the defendant] ‘substantially’ breached its duty by
 19 failing to act with even slight care.” *Id.* at 19.

20 Dkt. #249 at 6 (footnote omitted). In a footnote on that page, the Court stated in part:

21 The Washington State Supreme Court has also stated that gross
 22 negligence is the “failure to exercise slight care, mean[ing] not the
 23 total absence of care but care substantially or appreciably less than
 24 the quantum of care inhering in ordinary negligence.” *Swank v.*
 25 *Valley Christian Sch.*, 188 Wn.2d 663, 684, 398 P.3d 1108, 1120
 26 (2017).

27 *Id.* at 6 n.1.

28 Plaintiffs now moves “for an order that Section 8 is unenforceable under Washington
 29 law and Washington State public policy to the extent it varies U.S. Bank’s duty of ordinary care
 30 or limits Plaintiffs’ damages caused by U.S. Bank’s ordinary negligence.” Dkt. #285 at 5.

III. DISCUSSION

A. Legal Standard for Summary Judgment

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

On a motion for summary judgment, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable inferences in favor of the non-moving party. See *O’Melveny & Meyers*, 969 F.2d at 747, *rev’d on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient showing on an essential element of her case with respect to which she has the burden of proof” to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. Analysis

1. UCC Article 4

Washington’s Uniform Commercial Code Article 4 (“Bank Deposits and Collections”) limits the extent to which banks can avoid liability for ordinary negligence. Specifically, Section 4-103(a) of Washington’s UCC provides:

The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement cannot disclaim a bank’s responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the

1 standards by which the bank's responsibility is to be measured if
 2 those standards are not manifestly unreasonable.

3 RCW 62A.4-103(a). RCW 62A.4-105 defines "bank" as "a person engaged in the business of
 4 banking, including a savings bank, savings and loan association, credit union, or trust
 5 company." The business of banking is not further defined.

6 Plaintiffs maintain that the Master Escrow Agreement's exculpatory clause above is
 7 invalid under RCW 62A.4-103(a) because it attempts to disclaim U.S. Bank's responsibility for
 8 a failure to exercise ordinary care by limiting liability to situations where a court finds gross
 9 negligence or willful misconduct. Dkt. #285 at 6–8.

10 U.S. Bank argues that UCC Article 4 has no relevance to this case because it is entitled
 11 "Bank Deposits and Collections" and does not deal with escrow. Dkt. #305 at 12–13. U.S.
 12 Bank argues that escrow services are not part of the business of banking, *id.* at 13–14, and that
 13 banks can perform non-banking functions that fall outside of banking regulations, *id.* at 14–15.

14 Neither party cites directly on-point Washington law. The Court has reviewed the out-
 15 of-state cases cited by the parties and generally agrees with U.S. Bank's position. Given the
 16 undisputed facts, Plaintiffs have failed to convince the Court that U.S. Bank was engaged in the
 17 business of banking when it offered the escrow services at issue. The dispute in this case deals
 18 with U.S. Bank's release of funds from escrow and the terms of the Escrow Agreement rather
 19 than the actions U.S. Bank took depositing the escrow money in a U.S. Bank account.
 20 Accordingly, Uniform Commercial Code Article 4 does not invalidate the Master Escrow
 21 Agreement's exculpatory clause.

22 **2. Violation of Public Policy**

23 Plaintiffs also argue that the exculpatory clause is void as against public policy. Dkt.
 24 #285 at 8–15 (citing *Wagenblast v. Odessa School District No. 105-157-166J*, 110 Wn.2d 845,

1 851-56, 758 P.2d 968 (1988); *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441
 2 (1963)). The parties agree that, under Washington law, an exculpatory clause may be voided
 3 by a Court if the underlying transaction displays some or all of the following characteristics:

4 [1] It concerns a business of a type generally thought suitable for
 5 public regulation. [2] The party seeking exculpation is engaged in
 6 performing a service of great importance to the public, which is
 7 often a matter of practical necessity for some members of the
 8 public. [3] The party holds himself out as willing to perform this
 9 service for any member of the public who seeks it, or at least for
 10 any member coming within certain established standards. [4] As a
 11 result of the essential nature of the service, in the economic setting
 12 of the transaction, the party invoking exculpation possesses a
 13 decisive advantage of bargaining strength against any member of
 14 the public who seeks his services. [5] In exercising a superior
 15 bargaining power the party confronts the public with a
 16 standardized adhesion contract of exculpation, and makes no
 17 provision whereby a purchaser may pay additional reasonable fees
 18 and obtain protection against negligence. [6] Finally, as a result of
 19 the transaction, the person or property of the purchaser is placed
 20 under the control of the seller, subject to the risk of carelessness by
 21 the seller or his agents.

22 *Wagenblast*, 110 Wn.2d at 851-52 (quoting *Tunkl*, 60 Cal. 2d at 98-101). “[T]he more of the
 23 foregoing six characteristics that appear in a given exculpatory agreement case, the more likely
 24 the agreement is to be declared invalid on public policy grounds.” *Id.* at 852.

25 In *Wagenblast*, the Court found an exculpatory clause in violation of public policy in
 26 the context of releases for public school interscholastic sports. *Id.* at 856. There is no similar
 27 Washington case addressing exculpatory clauses in escrow agreements. Defendants cite to
 28 cases where Washington Courts have applied *Wagenblast* to hold an exculpatory clause invalid
 in the context of medical research involving human subjects, *Vodopest v. MacGregor*, 128
 Wn.2d 840, 913 P.2d 779 (1996) and pre-employment physical examinations, *Eelbode v. Chec
 Med. Ctrs., Inc.*, 97 Wn. App. 462, 984 P.2d 436 (1999), but not in the context of health clubs,
Shields v. Sta-Fit, Inc., 79 Wn. App. 584, 903 P.2d 525 (1995).

Both parties have pointed to out-of-state escrow exculpatory clause cases in an effort to aid the Court. Plaintiffs cite to *Akin v. Business Title Corp.*, 264 Cal. App. 2d 153, 70 Cal. Rptr. 287 (Ct. App. 1968). In *Akin*, the California Court of Appeal applied the *Tunkl* factors to invalidate an exculpatory clause shielding an escrow agent from liability except in cases of “gross negligence or willful misconduct.” 264 Cal. App. at 155. Under California law the exculpatory clause at issue in this case would apparently be void. U.S. Bank cites to cases from Illinois, New Mexico, and elsewhere reaching the opposite conclusion. Dkt #305 at 24 – 25 (citing, e.g., *Home Healthcare of Ill., Inc. v. Jesk*, 112 N.E.3d 594, 603 (Ill. App. 2017); *Lynch v. Santa Fe Nat'l Bank*, 97 N.M. 554, 627 P.2d 1247 (1981)). Many of the *Tunkl* characteristics were not present in those cases (nor in *Shields, supra*). Given that the controlling Washington case cites directly to the California Supreme Court, the Court is more persuaded by the analysis in *Akin* than the cases cited by U.S. Bank. U.S. Bank’s opposition does not even mention *Akin*.

U.S. Bank cite to *Shields, supra* for the proposition that *Wagenblast* can only be applied in cases involving “essential public services.” Dkt. #305 at 4. *Shields* stated:

A common thread runs through those cases in which exculpatory agreements have been found to be void as against public policy. That common thread is they are all essential public services-- hospitals, housing, public utilities, and public education.

Health clubs are a good idea and no doubt contribute to the health of the individual participants and the community at large. But ultimately they are not essential to the welfare of the state or its citizens. And any analogy to schools, hospitals, housing (public or private) and public utilities therefore fails. Health clubs do not provide essential services.

79 Wn. App. at 589. It is not clear to the Court, however, that *Shields* modifies the holding of *Wagenblast*, rather it seems to be merely commenting on what has satisfied the test in the past.

1 It does not hold that the “service of great importance to the public” characteristic *must* be
2 present or is to be weighed more heavily than the other characteristics.

3 The Court will step through the six characteristics above. The Court finds that escrow
4 businesses are generally thought suitable for public regulation in Washington as they are
5 subject to the Escrow Agent Registration Act, RCW Chapter 18.44, and WAC 208-680. There
6 is no dispute that U.S. Bank holds itself out as willing to perform this service for any member
7 of the public who seeks it, or at least for any member coming within certain established
8 standards. The undisputed facts in the record indicate that, in the economic setting of the
9 transaction, U.S. Bank possessed a decisive advantage of bargaining strength against the
10 Plaintiffs as investors, who were outsiders to the negotiations. U.S. Bank pre-negotiated the
11 terms of the escrow agreement with the receiving party, forcing investors to sign a joinder if
12 they wanted to invest. Characteristics five and six are not seriously disputed by U.S. Bank, as
13 the investors were given a standardized adhesion contract of exculpation with no provision to
14 pay additional reasonable fees and obtain protection against negligence, and the very nature of
15 escrow placed the property of the purchaser under the control of the seller, subject to the risk of
16 carelessness by the seller or his agents. The investors were essentially members of the public
17 in that they were not known to U.S. Bank at the time the Escrow Agreement was drafted.

21 The Court thus finds that five of the six characteristics are met. The characteristic at
22 issue is whether the escrow services were of great importance to the public. The Court is
23 persuaded by the logic of *Akin*, which found that the escrow company at issue performed an
24 important public service, and that “[a]lthough it is possible for a party involved in a real estate
25 transaction to get another escrow agent, or to not use the standard escrow procedure, it is often
26 a matter of ‘practical necessity’ for some members of the public to use the designated escrow
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agent.” 264 Cal. App. 2d at 157. Here, U.S. Bank attempts to keep the Court focused on the peculiar nature of the transaction at issue but fails to explain why its escrow services are not of great importance to the public generally. Instead, U.S. Bank flirts with *ipse dixit*. See Dkt. #305 at 21 (“Plaintiffs have presented no evidence that the commercial escrow services provided here are of great importance to the public or are a matter of practical necessity for some members of the public (and they are not.”). Any individual escrow transaction can be made to look private in nature. However, this transaction involved hundreds of investors with no obvious connection to U.S. Bank being asked to limit U.S. Bank’s liability. And, elsewhere in briefing, U.S. Bank has argued that this kind of exculpatory clause is the industry standard rather than some special provision provided only in commercial escrow services for EB-5 investments with Chinese investors. See Dkt. #305 at 3 (“...the industry-standard limitation of liability provision in the Master Escrow Agreement...”); Dkt. #305 at 7 (citing Dkt. #235 at ¶ 16 (“limitation of liability provisions like those to which Plaintiffs agreed are typical in the industry”)); Dkt. #305 at 19 (“Such a ruling would upend an entire industry, in which limitations of liability like the one at issue here are standard.”). The Court is inclined to look at the bigger picture in answering this question. Given all of the above, the Court now finds that the escrow services provided by U.S. Bank here are of great importance to the public and involve an essential public service for some members of the public. This final characteristic is satisfied.

Given the above law and analysis, the Court finds that the exculpatory clause in the Master Escrow Agreement is void as against public policy to the extent it purports to exculpate U.S. Bank from liability for ordinary negligence. The Court notes that this ruling does not

1 affect the exculpatory clause's limitation of liability to where it was the "primary cause of any
2 loss."

3 **IV. CONCLUSION**

4 Having considered the applicable briefing submitted by the parties and the entire record,
5 the Court hereby finds and ORDERS that Plaintiffs' Motion for Partial Summary Judgment re:
6 Unenforceability of Exculpatory Clause, Dkt. #285, is GRANTED IN PART as set forth above.
7 The exculpatory clause in the Master Escrow Agreement at issue in this case is void as against
8 public policy to the extent it purports to exculpate U.S. Bank from liability for ordinary
9 negligence.

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11 DATED this 14th day of December, 2020.
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16 RICARDO S. MARTINEZ
17 CHIEF UNITED STATES DISTRICT JUDGE
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